Supreme Court, U.S.
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No. 90-5844

In The

Supreme Court of the United States

October Term, 1990

TERRY FOUCHA,

Petitioner,

v.

LOUISIANA,

Respondents.

On Writ Of Certiorari To The Louisiana Supreme Court

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

DOES THE LOUISIANA STATUTORY SCHEME WHICH ALLOWS THE STATE TO CONFINE AN INSANITY ACQUITTEE WHO IS NO LONGER MENTALLY ILL FOR AN INDEFINITE PERIOD OF TIME, SOLELY ON THE GROUNDS THAT THE INDIVIDUAL MAY BE A DANGER TO HIMSELF OR OTHERS, VIOLATE THE DUE PROCESS AND/OR EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

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OPINION BELOW

The opinion of the Louisiana Supreme Court rendered June 14, 1990 and entered on the same date, affirming the refusal of trial court to implement the deinstitutionalization program as recommended by a three-member panel of psychiatrists from the Feliciana Forensic Facility is attached hereto at J.A. 42-44.

BASIS OF JURISDICTION

Jurisdiction is invoked under Title 28, United States Code, Section 1257(2).

STATEMENT

All medical evidence and testimony clearly indicates that your Petitioner, TERRY FOUCHA, has been free from all forms of mental illness since his commitment to the Louisiana State Mental Hospital, also known as the Feliciana Forensic Facility, on March 29, 1984. (J.A. 10-11).

Mr. Foucha was charged by Bill of Information with aggravated burglary in violation of LA. R.S. 14:60 and illegal discharge of a firearm in violation of LA. R.S. 14:94.[1] Mr. Foucha was found not guilty by reason of insanity and was ordered to undergo treatment at the Feliciana Facility on October 12, 1984. (J.A. 6-7). The Feliciana Forensic Facility, pursuant to LA. C.Cr.P.

[1] See Joint Appendix 28-29 at which appears Footnotes 1 and 2 of the Louisiana Supreme Court opinion.

654-657[2], appointed a three-member panel, which unanimously recommended that a probationary plan for

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[2] Louisiana Code of Criminal Procedure Article 654 provides:

When a verdict of not guilty by reason of insanity is returned in a capital case, the court shall commit the defendant to a proper state mental institution or to a private mental institution approved by the court for custody, care, and treatment.

When a defendant is found not guilty by reason of insanity in any other felony case, the court shall remand him to the parish jail or to a private mental institution approved by the court and shall promptly hold a contradictory hearing at which the defendant shall have the burden of proof, to determine whether the defendant can be discharged or can be released on probation, without danger to others or to himself. If the court determines that the defendant cannot be released without danger to others or to himself, it shall order him committed to a proper state mental institution or to a private mental institution approved by the court for custody, care, and treatment. If the court determines that the defendant can be discharged or released on probation without danger to others or to himself, the court shall either order his discharge, or order his release on probation subject to specified conditions for a fixed or an indeterminate period. The court shall assign written findings of fact and conclusions of law; however, the assignment of reasons shall not delay the implementation of judgment.

Louisiana Code of Criminal Procedure Article 655 provides:

A. When the superintendent of a mental institution is of the opinion that a person committed pursuant to Article 654 can be discharged or can be, released on probation, without danger to others or to himself, he shall recommend the discharge or release of the person in a report to a review panel comprised of the person's treating physician, the clinical director of the facility to which the person is committed, and a

(Continued on following page)

deinstitutionalization be implemented on March 21, 1988. (J.A. 10-11). The panel unanimously recommended that

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(Continued from previous page)

physician or psychologist who served on the sanity commission which recommended commitment of the person. If any member of the panel is unable to serve, a physician or a psychologist engaged in the practice of clinical or counseling psychology with at least three years experience in the field of mental health shall be appointed by the remaining members. The panel shall review all reports received promptly. After review, the panel shall make a recommendation to the court by which the person was committed as to the person's mental condition and whether he can be discharged, conditionally or unconditionally, or placed on probation, without being a danger to others or himself. If the review panel recommends to the court that the person be discharged, conditionally or unconditionally, or placed on probation, the court shall conduct a contradictory hearing following notice to the district attorney.

B. A person committed pursuant to Article 654 may make application to the review panel for discharge or for release on probation. Such application by a committed person may not be filed until the committed person has been confined for a period of at least six months after the original commitment. If the review panel recommends to the court that the person be discharged, conditionally or unconditionally, or placed on probation, the court shall conduct a hearing following notice to the district attorney. If the recommendation of the review panel or the court is adverse, the applicant shall not be permitted to file another application until one year has elapsed from the date of determination.

C. The superintendent of the mental institution shall, under both Paragraphs A and B of this article, transmit a copy of this report and recommendation to the person committed or his attorney and to the district attorney of the parish from which the person was committed.

(Continued on following page)

Terry Foucha be conditionally discharged with certain recommendations: 1) he be placed on probation; (2) he remain free from intoxicating and mind altering substances; 3) he attend a substance abuse clinic; 4) he submit to regular and random drug screening; and 5) he seek

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Louisiana Code of Criminal Procedure Article 656 provides:

A. Upon receipt of the superintendent's report, filed in conformity with Article 655, the review panel may examine the committed person and report, to the court promptly, whether he can be safely discharged, conditionally or unconditionally, or be safely released on probation, without danger to others or himself.

B. The committed person or the district attorney may also retain a physician to examine the committed person for the same purpose. The physicians's report shall be filed with the court.

Louisiana Code of Criminal Procedure Article 657 provides:

After considering the report or reports filed pursuant to Articles 655 and 656, the court may either continue the commitment or hold a contradictory hearing to determine whether the committed person can be discharged or can be released on probation, without danger to others or to himself.

At the hearing the burden shall be upon the committed person to prove that he can be discharged, or can be released on probation, without danger to others or to himself. After the hearing, and upon filing written findings of fact and conclusions of law, the court may order the committed person discharged, released on probation subject to specified conditions for a fixed or an indeterminate period, or recommitted to the state mental institution. Notice to the counsel for the committed person and the district attorney of the contradictory hearing shall be given at least thirty days prior to the hearing.

employment. Pursuant to Louisiana Code of Criminal Procedure Article 658,[3] Mr. Foucha would be under the

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[3] Louisiana Code of Criminal Procedure Article 658 provides:

A. When the committed person is released on probation, the clerk of court shall deliver to him a certificate setting forth the period and the conditions of his probation. It shall be a condition of every such probation that the person released shall be recommitted if he becomes dangerous to others or to himself. The probationer shall be required to agree in writing to the conditions of his probation.

B. The probationer shall be under the supervision of the division of probation and parole. When the probationer violated or is about to violate the conditions of his probation, he may be arrested and detained in conformity with the applicable provisions of Article 899.

C. If the court determines that there has been a violation or that the probationer was about to violate the conditions of probation it shall:

(1) Reprimand and warn the probationer;

(2) Order that supervision be intensified;

(3) Modify or add additional conditions to the probation; or

(4) Revoke the probation and recommit the probationer to a state mental institution, subject to consideration for discharge or release on probation only after one year has elapsed from the date of revocation and in accordance with the procedure prescribed in Articles 655-657 for a first application and hearing.

D. The Court may completely discharge the probationer at any time after the expiration of one year of probation only on recommendation of the director of the division of probation and parole or on other proper evidence, and after a contradictory hearing with the district attorney.

strict supervision of the division of probation and parole. As per Article 655 of the Louisiana Code of Criminal Procedure, Mr. Foucha was found by the panel to be no longer mentally ill, as defined by Louisiana Revised Statute 28:2(14) and the panel was of the opinion that Mr. Foucha is no longer dangerous to others or to himself as defined by Louisiana Revised Statute 28:2(3) and (4).[4] The Honorable Shirley G. Wimberly, Trial Judge, then on his own motion, appointed a two-member Sanity Commission. (J.A. 13).

At the Status Sanity Hearing conducted on November 29, 1988, the Court received the testimony of appointed examining psychiatrist, Dr. Kenneth Ritter. (J.A. 14). It was stipulated that the testimony of Dr. Ignacio Medina, Jr. would be essentially the same. Dr. Ritter stated that there was no evidence that Mr. Foucha currently suffered

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[4] Louisiana Revised Statutes 28:2(14)

"Dangerous to others" means the condition of a person whose behavior of significant threats support a reasonable expectation that there is a substantial risk that he will inflict physical harm upon another person in the near future.

Louisiana Revised Statutes 28:2(3)

"Dangerous to self" means the condition of a person whose behavior, significant threats or inaction supports a reasonable expectation that there is a substantial risk that he will inflict physical or severe emotional harm upon his own person.

Louisiana Revised Statutes 28:2(4)

"Mentally ill person" means any person with a psychiatric disorder which has substantial adverse effects on his ability to function and who requires care and treatment. It does not refer to a person suffering solely from mental retardation, epilepsy, alcoholism, or drug abuse.

from any psychosis or neurosis. Dr. Ritter stated that Mr. Foucha would not benefit from continued confinement at the Feliciana Forensic Facility. (J.A. 15).

The Trial Court denied the motion to grant the implementation of the Panel's recommended program despite the opinion of a total of five doctors that Mr. Foucha does not currently suffer from any form of psychosis or neurosis and that no benefit will be gained by continued confinement. (J.A. 22-23).

The Fourth Circuit Court of Appeals for the State of Louisiana denied the defendant-relator's Application for Supervisory Writs by a 2-1 vote on May 18, 1989. (J.A. 25-26). The two-member majority, while taking note in their opinion, ignored the fact that the three-member forensic panel unanimously recommended a probationary plan of deinstitutionalization. The Majority based its decision upon the fact that a single doctor, Dr. Ritter, could not say that the defendant-relator would not be a danger to himself or to others, and upon certain incidents occurring after the panel concluded that the defendant-relator's condition of anti-social behavior was not treatable in a mental institution. The dissenting Judge, the Honorable Steven R. Plotkin, cited *State v. Boulmay*, 498 So.2d 213 (La. App. 1st Cir. 1986), writ denied 503 So.2d 473 (La. 1987) in finding that anti-social behavior is not a legal grounds for confinement of Feliciana Forensic Facility.

The Constitutionality of the Louisiana Statutory scheme for the continued confinement of an insanity acquittee was raised by the defendant with Lousiaina's Highest Court.

The Louisiana Supreme Court affirmed the judgment of the trial court on the grounds that Louisiana's Statutory scheme for the continued confinement of an insanity acquittee did not violate the appellant's rights to due process and equal protection of the laws as guaranteed by the Fourteenth Amendment of the United States Constitution, despite the Petitioner's argument to the contrary. (J.A. 28-53). The Louisiana Supreme Court found that a sole finding of dangerousness, without a concurrent finding of continuing mental illness, was sufficient to deny release. Thus, the Louisiana scheme permits the confinement of a non-mentally ill, insanity acquittee, for an indefinite period of time, solely on the grounds that the non-responsibility acquittee failed to satisfactorily convince the trial court that he presents no risk of danger to himself or others, despite the uncontradicted evidence that he is no longer mentally ill.

SUMMARY OF ARGUMENT

The Louisiana Statutory scheme that allows for the continued confinement in a mental institution of an individual who has been found not guilty by reason of insanity, solely upon the finding by the trial court that the individual has failed to establish that he is not a danger. This Court held in *Jones v. United States*, 463 U.S. 354 at 370 (1983), that the Government may continue to confine an insanity acquittee until such time that he establishes that he is no longer mentally ill or is not a danger.

The rationale for *Jones* is substantiated by this Court's treatment of a related issue in *O'Connor v. Donaldson*, 422

U.S. 563 (1975). In *O'Connor*, this Court found that a non-dangerous individual may not be constitutionally confined despite evidence of mental illness. It is urged that Fourteenth Amendment Due Process requires the finding of both mental illness and dangerousness to justify the continued confinement of an insanity acquittee. This is so because the insanity acquittee has been hospitalized for the purposes of treatment and safety and not for punishment, as he has not been convicted. Due Process requires that the nature and duration of commitment bear some reasonable relationship to the purpose for which the individual is committed, *Jackson v. Indiana*, 406 U.S. 715 (1972). It is suggested that once one of the duel purposes for confinement is eliminated, be it dangerousness as discussed in *O'Connor*, or mental illness as in *Jones* and as with Mr. Foucha, it becomes unreasonable to continue confinement at all, or at least, for an indefinite period of time.

It is further urged that the Equal Protection Clause of the Fourteenth Amendment is also violated in that there is no justifiable distinction between persons committed civilly and persons found not guilty by reason of insanity to Constitutionally permit the State to allow the confinement of non-mentally ill insanity acquittees when a civilly committed, non-mentally ill, yet dangerous individual would be released.

ISSUE

DOES THE LOUISIANA STATUTORY SCHEME WHICH ALLOWS THE STATE TO CONFINE, FOR AN UNLIMITED PERIOD OF TIME, AN INSANITY ACQUITTEE, WHO IS NO LONGER MENTALLY ILL, SOLELY ON THE GROUNDS THAT THE INDIVIDUAL MAY BE A DANGER TO HIMSELF OR OTHERS, VIOLATE THE DUE PROCESS AND/OR EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

ARGUMENT

The Fourteenth Amendment of the United States Constitution of 1787 provides in part that no State shall deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. It is respectfully urged that the Constitutional rights of your petitioner, TERRY FOUCHA, have been violated in the following manner.

DUE PROCESS

Louisiana Code of Criminal Procedure, Articles 654-657, provides that an individual who has been found not guilty by reason of insanity of a criminal offense shall be incarcerated at a mental institution or parish jail, until such time that the insanity acquittee meets the burden of proof that he can be released without danger to himself or others. The Louisiana Supreme Court, by a 4-3 majority, upheld the Constitutionality of the scheme that provides for the continued confinement of an insanity acquittee even after the individual has been found to no

longer be mentally ill, solely on the grounds that the individual may be a danger to himself or others. (J.A. 28).

This holding is clearly contrary to the language utilized by this Honorable Court in *Jones v. United States*, 463 U.S. 354 (1983).[5] In that case, this Honorable Court found that a State could confine an insanity acquittee only until the individual reacquired his sanity *or* is no longer a danger.[6] This holding clearly expressed the Court's opinion that there are two prongs to consider in analyzing the grounds for release of an insanity acquittee: 1) Whether the individual has regained his/her sanity; 2) Whether the individual is a danger to himself or society. Moreover, the language utilized by this Court clearly stated that the Constitution only permits a State to confine an insanity acquittee if both prongs are answered in the affirmative. This position is supported by the American Bar Association.[7]

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[5] It also appears that the Louisiana Supreme Court's opinion below is a departure from the Court's initial leaning in favor of the United States Fifth Circuit's approach in *Francois v. Henderson*, infra. See *State ex rel. LaVigne v. Criminal District Court*, 532 So.2d 165 (La. 1988) where the Louisiana Supreme Court granted the applicant's supervisory writ and ordered the trial court to conduct a discharge hearing. The Court further ordered the district court to consider the analysis of constitutionality utilized by the Fifth Circuit in *Francois*.

[6] "We hold that when a criminal defendant establishes by a preponderance of the evidence, that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has reacquired his sanity or is no longer a danger to himself or society." *Jones v. United States*, 463 U.S. at 370 (1983).

[7] See American Bar Association Criminal Justice Mental Health Standards, Standard 7-7.4.

The 4-member majority of the Louisiana Supreme Court dismissed the language in *Jones* on the grounds that it mirrored the District of Columbia statute which required the release of an insanity acquittee if the individual was no longer mentally ill *or* not dangerous.[8]

In support of its holding, the Louisiana Supreme Court majority cites the United States Fourth Circuit Court of Appeal's decision in *Harris v. Ballone* 681 F.2d 225 (4th Cir.1982), which upheld the Virginia scheme and the Ninth Circuit Court of Appeal's decision in *Hickey v. Morris*, 722 F.2d 543 (9th Cir.1983).[9] It is respectfully urged that the Louisiana Supreme Court's interpretation of *Jones* is wrong and the Court's reliance on *Harris* and *Hickey* is erroneous.

It is urged that the Louisiana Supreme Court's interpretation of *Jones* disregards the Congressional intent, clearly set forth in the legislative history, in adopting the District of Columbia's overall statutory scheme.[10]

It is clear from the legislative history that Congress intended that, "(w)here (the) accused has pleaded insanity as a defense to a crime, . . . it is just and reasonable that the insanity . . . should be presumed to continue and the accused should be confined for treatment until it can be shown that he as recovered."[11] It is apparent,

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[8] See Footnote 11 of the Louisiana Supreme Court decision at J.A. 36 and 37.

[9] See Louisiana Supreme Court opinion at J.A. 37-39, along with Justice Dennis' dissent at J.A. 50 and 51.

[10] See *Jones v. United States*, 463 U.S. at 363-366 (1983).

[11] See *Jones v. United States*, 463 U.S. at 364 (1983).

therefore, that when Congress was drafting the language utilized in the District of Columbia statute, the underlying concern was for the confinement of the insanity acquittee for purposes of the individual's treatment only until his recovery.

This Court noted that the fact that the insanity acquittee was entitled to a hearing within fifty (50) days of commitment, provided assurances that a prompt release was available, "if he has recovered".[12]

The question before this Court is not the legitimacy of Mr. Foucha's initial commitment, but rather his continued incarceration after establishing the recovery of his sanity.

Furthermore, in regards to the Fourth Circuit's 1982 decision in *Harris*, it is respectfully suggested that the Fourth Circuit's opinion is contradictory to the later teachings of this Court in *Jones*.[13] Moreover, it is suggested that the overall statutory scheme in Washington which was upheld by the Ninth Circuit in *Hickey v. Morris*, supra, provides significantly greater protections to insanity acquittees than does the Louisiana scheme.

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[12] See *Jones v. United States*, 463 U.S. at 366 (1983).

[13] The Fourth Circuit correctly distinguishes the issue in *Harris* from the issue decided by this Court in *O'Connor v. Donaldson*, 422 U.S. 563 (1975). In light of the fact that the Fourth Circuit's holding was prior to this Court's decision in *Jones* and the failure of the Fourth Circuit to find any support from prior Supreme Court decisions, it is suggested that any reliance upon this opinion by the respondent or the Louisiana Supreme Court is erroneous.

The Ninth Circuit found that it was not a denial of due process to incarcerate an individual who has committed a criminal act as long as he is considered dangerous. Significantly, though, the insanity acquittee could not be incarcerated for a period greater than the maximum penal term applicable to the charged offense. Louisiana's scheme, to the contrary, provides no limitation as to the duration of potential confinement. While this Court made clear in *Jones* that the Constitution does not require that the duration of confinement of an insanity acquittee who is both mentally ill and dangerous be limited, it is urged that an unlimited confinement of a non-mentally ill insanity acquittee is distinguishable and is contrary to the principles of Due Process.[14]

"Due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715 at 738 (1972).

"Commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection and the State must have a constitutionally adequate purpose for confinement." *Addington v. Texas*, 441 U.S. 418 at 425 (1979). Therefore, the Louisiana scheme provides that your appellant, who has been

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[14] In fact, the Ninth Circuit in *Hickey* at 549 made clear that their opinion that the petitioner's right to due process was not violated based, in part, on the fact that the insanity acquittee's confinement was limited to maximum penal term of the crime charged. Further confinement could occur only by means of the normal civil commitment procedure. This is not the case in Louisiana.

found by five doctors to no longer be mentally ill, may be confined for an indefinite period of time solely because the trial court found that he may be a danger to himself or others. The trial court based its ruling on the fact that the appellant had been involved in an altercation which resulted in an individual being jabbed with a pen, (J.A. 15-16), and the testifying psychiatrist would not "certify" that the appellant might not be a danger to himself or others. (J.A. 18). It should be noted that a rigid plan for deinstitutionalization was recommended by the 3-member panel of psychiatrists for the State Mental Institution. (J.A. 10-11). Thus, the appellant would not merely be set free from governmental supervision.

As this Court asserted in *Jones* at page 369, the continued confinement of an insanity acquittee, " . . . rests on his continuing illness and dangerousness". This Court agreed with the D.C. Circuit Court of Appeal's logic in *Jones*, as espoused at 432 A.2d at 369, that, "(s)ociety may not excuse a defendant's criminal behavior because of his insanity and at the same time punish him for invoking the insanity defense". This Court stated that an insanity acquittee, "may not be punished" in that he has not been convicted of any crime.

Mr. Foucha was found to be not responsible based upon the mental disability which he suffered at the time of the predicate offense. This Court has made clear that the purpose of commitment of both insanity acquittees and civil committees, is to treat the individual's mental illness "and" protect him and society from his potential dangerousness.[15] This Court went on to immediately add

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[15] See *Jones v. United States*, 463 U.S. at 368 (1983).

that the committed acquittee is entitled to release when he has recovered his sanity "or" is no longer dangerous. It is urged that the Court's use of the conjunctive "and", along with the disjunctive "or" reflects the Court's view that commitment is necessary not to punish the acquittee, but instead to accomplish the interrelated purposes of treatment and protection. These are connected in light of the fact that the dangerous activity at the source of the predicate offense occurred while the individual was mentally ill. It is logical, therefore, that upon the elimination of either his potential dangerousness or his mental illness, release of the individual is demanded. This reasoning is substantiated by the language utilized in *Jones*,[16] and by the Court's holding in *O'Connor v. Donaldson*, 422 U.S. 563 (1975). In that case, this Court held that the State cannot Constitutionally confine, without more, a non-dangerous individual, who is capable of surviving safely in freedom. It is clear, therefore, that an order to confine and individual, without violating his Constitutional rights, it is essential that both dangerousness *AND* mental illness be present. It is urged that if both dangerousness *AND* mental illness are reasonably related to the purpose for the initial confinement as required by *Jackson v. Indiana*, supra,[17] the absence of either eliminates the justification for continued confinement. Any other result would transform the confinement for purposes of treatment and protection into the mere incarceration of an

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[16] "The committed acquittee is entitled to release when he had recovered his sanity or is no longer dangerous." *Jones v. United States*, 463 U.S. at 368 (1983).

[17] See *Jackson v. Indiana*, 406 U.S. at 738 (1972).

individual who has never been convicted of a crime. Moreover, it is respectfully urged that it is unreasonable to allow the incarceration of a non-mentally ill individual for an unlimited duration.

The Louisiana Supreme Court majority found that the Louisiana scheme satisfies due process based upon the three factors stated in *Mathews v. Eldridge*, 424 U.S. 319 at 335 (1976).[18] Without dealing with each of the three factors, the majority found that . . . "the dangerousness test of La.C.Cr.P. Article 654-657 is constitutional." (J.A. 43). Moreover, the majority cited the concurring opinion of the Honorable former Chief Justice Burger in *O'Connor v. Donaldson*, supra,[19] stating his belief that an individual may be confined by the State to protect society in exercise of the police power of the State.

While the majority in *O'Connor* at 575, stated that . . . "the State may arguably confine a person to save him from harm . . . " The Court went on to state that . . . "incarceration is rarely, *if ever* a necessary condition . . . ".[20] Moreover, the Court specifically limited the issue to be decided in *O'Connor* to the liberty interests of mentally ill

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[18] "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 219, 335 (1976).

[19] See *O'Connor v. Donaldson*, 422 U.S. at 582-583 (1975).

[20] See *O'Connor v. Donaldson*, 422 U.S. at 575 (1975).

individuals who are found not to be dangerous.[21] That issue is quite different from the State continuing to confine a non-mentally ill individual in a mental institution, as we have in the present case. Furthermore, the Court in *O'Connor* found mental illness alone is not sufficient to justify the "State's locking a person up against his will and keeping him indefinitely."[22] *O'Connor*, is, thus, consistent with *Jones* and your Petitioner's position.

Finally, it is suggested that public policy demands that a non-mentally ill citizen must not be confined to a mental hospital, for what may be a lifetime, solely based upon such a nebulous concept of potential dangerousness. The sight of a sane person being institutionalized in a hospital for the mentally ill should shock the conscience of a society based upon equal liberty and justice. It is especially abhorrent when the mental institution itself seeks the individual's release. Moreover, to require the individual to establish that he is not a danger, places an almost insurmountable burden upon those seeking release. The fact that Dr. Ritter would not "certify" that Mr. Foucha would not present a danger is evidence of the vagueness which encompasses this scheme. It is suggested that it is a rare occasion which would find any of us in society who would risk our reputation by "certifying" that someone would not present a danger.[23] This is

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[21] See *O'Connor v. Donaldson*, 422 U.S. at 573 (1975).

[22] See *O'Connor v. Donaldson*, 422 U.S. at 575 (1975).

[23] In *Francois v. Henderson*, 850 F.2d 231 (5th Cir. 1988). Dr. Ritter declined to certify that Mr. Francois would not be dangerous despite the recommendation of release submitted by the Forensic Facility.

in spite of the fact that the Review Panel's recommendation indicates the Facility's belief that he can be released without danger to himself or other. (J.A. 10-11).

EQUAL PROTECTION

In addition to the violation of the appellant's right to due process guaranteed by the Fourteenth Amendment, the Equal Protection Clause of that Amendment is also violated by the Louisiana scheme.

The United States Fifth Circuit Court of Appeal has clearly expressed its opinion that an individual who is not presently mentally ill, must be deinstitutionalized. *Francois v. Henderson*, 850 F.2d 231, 235-236 (5th Cir. 1983).[24] In *Hopkins v. Lynn*, 888 F.2d 35 (5th Cir. 1989), the Fifth Circuit supported its *Francois* opinion based upon this Court's treatment of the issue in *Jones*.[25] Those decisions are consistent with the long standing treatment of this issue by the Fifth Circuit. In *Jackson v. Foti*, 670 F.2d 516 (5th Cir. 1982), the Court faced an almost identical factual situation as is presented in this matter. While the Court doubted that the probative value of the evidence submitted showed that the applicant was sufficient to fall within the definite requirements of "dangerousness", the Fifth Circuit ordered the release of the applicant until

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[24] "Since Francois is not presently mentally ill, he must be deinstitutionalized", *Francois v. Henderson*, 850 F.2d at 235 (5th Cir. 1983).

[25] See Footnote 2 in *Hopkins v. Lynn*, 888 F.2d 35, at 37 (5th Cir. 1989).

such time as a judicial determination that the applicant was presently mental ill. The Court, at page 522, stated that:

> "Unless Jackson presently is mentally ill, as defined in the mental health law . . . , he may not be committed to an institution. The propensity for danger is not enough."

Moreover, the Court stated that:

> "Mental institutions exist for the benefit of those who can be helped by care and treatment or who require custodial attention. They can not substitute for prisons."

In *Francois*, the Court stated its basis for finding that Louisiana's scheme is presently violative of the Equal Protection Clause of the United States Constitution.

The Equal Protection Clause of the Fourteenth Amendment demands that the State afford insanity acquittees substantially the same protections that it gives persons committed under the ordinary civil commitment statute.

Baxstrom v. Herold, 383 U.S. 107 (1966); *Jackson v. Indiana*, 406 U.S. 715 (1972); *Humphrey v. Cady*, 405 U.S. 504 (1972); *Jackson v. Foti*, 670 F.2d 516 (5th Cir. 1982); *Powell v. Florida*, 579 F.2d 324, 332 (5th Cir. 1978).

The Civil Commitment procedures are set forth in Title 28 of the Louisiana Revised Statutes. This scheme became affective by the passage of Acts 1987, No. 928 Section 2, by the State legislature. Prior to 1987, La. R.S. 28:59 called for the commitment of insanity acquittees "in the manner provided for judicial commitment". This language enabled the provisions regarding civil commitment

to be read and applied in conjunction with the Criminal commitment articles. Thus, prior to 1987, Louisiana law required a duel finding of mental illness and dangerousness for both Civil commitments and insanity acquittees. It is respectfully asserted that such a scheme provide adequate Constitutional protections. The legislature changes in 1987 provides in La.R.S. 28:59(A) that, "Any person acquitted of a crime or misdemeanor by reason of insanity or mental defect may be committed to the proper institution in accordance with Code of Criminal Procedure Articles 654 et seq." These articles provide for the commitment of an insanity acquittee following a hearing to determine the single issue of dangerousness, La.C.Cr.P. Article 654. Hearings on applications for release are likewise limited solely to the issue of dangerous. La.C.Cr.P. Articles 655-657. No concurrent findings of mental illness is necessary for initial commitment or upon application for release is required in cases involving insanity acquittees.

As for the discharge of Civil committees who have shown dangerous tendencies, La.R.S. 28:56(C), provides that the director of the treatment facility may authorize discharge upon written consent of the division of hospitals after an examination and after a sufficient guarantee of proper supervision of the patient by a reputable person. La.R.S. 28:96(E) and 28:96.1(E). It should be noted that your appellant's discharge is conditioned upon a five-point plan submitted by the three-person psychiatric review panel, intended to assure the appellant's and others' safety. (J.A. 10-11).

The Louisiana Supreme Court found that differences in the Louisiana procedure reflect justifiable distinctions

between persons civilly committed and persons found not guilty by reason of insanity. The Court relied upon the reason stated in *Hickey v. Morris*, 722 F.2d 543 (9th Cir. 1983).

The Ninth Circuit in *Hickey* upheld the differences in the commitment procedures provided by the Washington law and cited *Jones v. United States*, 463 U.S. at 370.

In *Jones*, the petitioner, an insanity acquittee, contended that his indefinite commitment was unconstitutional because of proof of his insanity was based only by a preponderance of the evidence, as compared with *Addington v. Texas*, 441 U.S. 418 (1979), in which civil-commitment was required by proof of clear and convincing evidence. The Court recognized important differences between the class of potential civil-committees and insanity acquittees that justify "differing standard of proof."

It is respectfully asserted that the protections provided to an insanity acquittee, by requiring a concurrent finding of mental illness, in addition to dangerousness, cannot be justified by reasoning of *Jones*. The Court in *Addington*, found that the Due Process Clause of the Fourteenth Amendment was not violated by requiring the diminished burden of proof in insanity acquittee cases. The Court noted in *Jones* at F.N. 17, that in fact, the defendant is benefitted by the lesser burden of proof in that the criminal defendant is the party who will raise the issue of insanity.

The elimination of the element of mental illness, therefore, is distinguishable from the "differing standards of proof" as annunciated in *Jones*. Moreover, the language utilized by this Court to specify "differing standards of

proof" should not be interpreted by the lower Courts to include any difference in treatment.

Furthermore, in *Hickey*, the Court found that the State's different procedure for review and release were substantially related to important government interests. The State provided periodic judicial review for Civil committees and not for insanity acquittees. The Court found that this was justified of the grounds that Civil commitments are of potentially unlimited duration, while insanity acquittees cannot be confined longer than a maximum penal term for the crime charged. Therefore, the Court found that the Equal Protection Clause was not violated by the State's providing for 180-day judicial reviews for Civil committees as opposed to the insanity acquittee's semi-annual non-judicial reviews. If the hospital staff recommends release, there is a judicial hearing. If no recommendation is made, judicial review is discretionary. This difference was found to reflect justifiable distinctions regarding the treatment of each class.

Louisiana's scheme, to the contrary, and as stated above, provides absolutely no limit to the duration of the potential confinement of an insanity acquittee. Your appellant was found not guilty by reason of insanity on October 12, 1984 and was first recommended for release on March 21, 1988.

The Louisiana scheme clearly provides insanity acquittees with substantially less protection than are provided for civil protection than are provided for civil committees. This distinction is not justified by constitutionally adequate purposes.

CONCLUSION

The appellant has been recommended for release by a three-member panel of doctors set up by the State Mental Institution of which he is an "inmate". This recommendation is pursuant to their unanimous finding that he is no longer mentally ill, coupled with a deinstitutionalization plan catered to ensure his safe release back into society. In addition, the record indicates that the two court-appointed doctors concur in the diagnosis that the appellant does not presently suffer from any mental illness.

The appellant, a completely sane individual, according to five specialists, who was found not guilty because of his mental state at the time of the offense charge, is being forcibly held by the State of Louisiana in a mental institution. To quote Louisiana Supreme Court Justice Dennis, one of three dissenting Justices,

> "Something is drastically wrong with a legal system that permits a person who is no longer mentally ill to be confined indefinitely, perhaps for life, in an institution for the criminally insane simply because he was acquitted for a crime (on the basis of insanity at the time of offense), a crime for which, had he been convicted instead, he may have received a sentence of only a few months or years." (J.A. 53).

Mr. Foucha has been incarcerated for more than six years.

The United States Fifth Circuit in *Jackson v. Foti*, at 522 and repeated in *Francois* at 236 that:

> "Mental institutions exist for the benefit of those who can be helped by care and treatment or who require custodial attention. They are not substitutes for prisons. Nor can they be permitted to become such."

It is respectfully urged, that in Louisiana, mental institutions are far worse than prison because Mr. Foucha faces the prospect of spending the rest of his life, a life of sanity, in a mental institution. It is further urged that Mr. Foucha is not the only citizen who is being harmed by the State's approach. The continued confinement in the State Mental Institutions of individuals who are not mentally ill, harms those citizens who are in present need of psychiatric help. The mental hospital itself initiated these actions seeking the release of Mr. Foucha because their job was successfully completed in his case. There are other citizens who could benefit from their care. Thus, Mr. Foucha who is not mentally ill, is being harmed by being incarcerated in a mental institution, while there is a mentally ill person who is languishing in a Louisiana prison, instead of being treated for his mental illness.

It is further suggested that a convicted felon would be released at the expiration of his sentence, without regard to his potential dangerousness. It is offensive to the ideals of liberty and justice that a young person, who has been cured from his mental illness, could spend the rest of his life in a mental institution because of an incident which occurred while he suffered from a mental illness.

It is, therefore, respectfully requested that this Honorable Court reverse the decision of the Louisiana Supreme Court on the grounds that the Louisiana scheme for review and release on an insanity acquittee, violates the Fourteenth Amendment on the United States Constitution by allowing the continued confinement based

solely upon a judicial finding of dangerousness, without a concurrent finding of mental illness.

Respectfully Submitted,

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